Looi Wan Teik v Dijaya Enterprise Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1–12–367 OF 1998
KC VOHRAH J
22 JANUARY 2001

Civil Procedure *— Appeal — Record of appeal — Application for extension of time to file supplemental record of appeal — Whether application for leave should have been filed in sessions court — Whether High Court can entertain matter — Whether application should be made by way of notice of motion — Whether there is good reason in granting the application — for extension of time — Courts of Judicature Act 1964, Sch para 8*

The respondent appealed against the decision of the Deputy Registrar in granting of the appellant's application for an extension of time to file a supplemental record of appeal to include documents which had not been included in the original record of appeal. The respondent argued that if such an application could be made to the High Court at all, it should be made by notice of motion, and that leave should have been refused as no proper reason was given as to why the original record did not contain the missing documents. An important argument advanced is that the application should have been filed in the sessions court as the Rules of the High Court 1980 ('RHC') does not provide for an application for leave to extend time or to file a supplementary record.

Held, appeal allowed with costs:

(1) The rights of the sessions court is concurrent with that of the High Court by virtue of para 8 in the schedule to the Courts Judicature Act 1964 ('the Act'). Paragraph 8 of the schedule to the Act has given power to the High Court to enlarge or abridge time prescribed by any written law for doing any act or taking any proceeding. That power has to be exercised in accordance with any written law or rules of court relating to the same. As it stands no written law or rules have expressly provided the procedure for its exercise. The fact that such rules have not been provided does not oust the jurisdiction of the High Court. There is no good reason why when the appeal record is before the High Court the application to file a supplemental record cannot be heard in the High Court since in any event the appeal proper is to be heard by the High Court (see pp 508G–509A).

(2) Whether the application is by motion or summons-in-chambers is hardly important so long as both parties in the application and the affidavits relied upon by both are before the court and in any event the RHC is silent on the procedure (see p 509A).

(3) However, for an extension of time to succeed there must be good reason to show why the extension of time should be granted, ie why there was an omission to file their documents and that reason

was not supplied and accordingly the application should have been dismissed by the Deputy Registrar (see p 509B).

[**Bahasa Malaysia summary**

Responden merayu menentang permohonan perayu yang diberikan lanjutan tempoh masa oleh Penolong Kanan Pendaftar. Responden berhujah bahawa jika permohonan sedemikian boleh dibuat kepada Mahkamah Tinggi langsung, ia sepatutnya dibuat melalui notis usul, dan kebenaran sepatutnya dinafikan kerana tiada sebab yang betul diberikan atas soal kenapa rekod asal tidak mengandungi dokumen-dokumen yang hilang. Satu hujahan yang penting adalah bahawa permohonan tersebut sepatutnya difailkan di mahkamah sesyen kerana Kaedah-kaedah Mahkamah Tinggi 1980 tidak mengandungi peruntukan bagi permohonan kebenaran melanjutkan tempoh masa atau untuk memfailkan rekod tambahan.

Diputuskan, rayuan dibenarkan dengan kos:

(1) Ia penting untuk mengingati bahawa di hadapan Mahkamah Tinggi terdapat satu rayuan yang difailkan dengan mengikut aturan, ie Rayuan Sivil No R1–12–367–98. Mahkamah Tinggi memiliki permohonan tersebut dan mahkamah tidak dapat melihat apa-apa sebab yang baik mengapa memandangkan rekod rayuan tersebut ada pada Mahkamah Tinggi, permohonan untuk memfailkan satu rekod tambahan tidak boleh dibicarakan di Mahkamah Tinggi kerana dalam apa keadaan jua, rayuan yang sebenarnya akan dibicarakan di Mahkamah Tinggi (lihat ms 508G–509A).

(2) Sama ada permohonan tersebut adalah melalui usul atau saman-dalam-kamar kurang penting, asalkan kedua-dua pihak dalam permohonan tersebut dan afidavit-afidavit yang diperlukan oleh kedua-dua pihak berada di hadapan mahkamah, dan dalam apa keadaan jua KMT tidak menyatakan apa-apa mengenai prosedur ini (lihat ms 509A).

(3) Walau bagaimanapun, bagi membenarkan lanjutan tempoh masa perlu adanya sebab yang baik untuk menunjukkan mengapa lanjutan tempoh masa tersebut patut dibenarkan, ie mengapa terdapatnya peninggalan untuk memfailkan dokumen-dokumen dan sebab tersebut tidak diberi dan oleh itu, permohonan tersebut sepatutnya ditolak oleh penolong kanan pendaftar (lihat ms 509B).

Notes

For cases on record of appeal, see 2(1) Mallal's Digest (4th Ed, 1998 Reissue) paras 865–890.

Cases referred to

Lee Lan v Lim Yoon Loy & Ors [1991] 3 MLJ 419 (refd)
Soon Huat Construction Sdn Bhd v Kiong Siang Construction Sdn Bhd [1999] 4 MLJ 130 (refd)
Tan Lee Hong v Letchmee (Representative of the estate of Varathen, decd) [1994] 1 MLJ 515 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2), Sch para 8
Rules of the High Court 1980
Subordinate Courts Rules 1980 O 49 r 2(5)(b)

Appeal from:

Looi Pek Hong (*PH Looi & Co*) for the appellant.
Philip Chai (*Soo Thien Ming & Nasrah*) for the respondent.

KC Vohrah J. : This is an appeal against the decision of the deputy registrar who allowed the application by the appellant in this case for extension of time to file a supplementary record of appeal to include documents which had not been included in the original record of appeal.

The application made before the deputy registrar was by way of summons in chambers. The respondent argues that the application, if at all an application of such a nature could be made to the High Court, should have been made by notice of motion.

The respondent also argued before me that in any event, no proper reason was given as to why the original record did not contain the missing documents and as such leave should have been refused.

There is an important argument advanced which needs to be considered. It is this — that the application should not have been filed in the High Court but in the sessions court from which the appeal arose as there is no rule in the Rules of the High Court 1980 ('the RHC') providing for an application for leave to extend time or to file a supplementary record. The learned counsel for the respondent relied on the case of *Soon Huat Construction Sdn Bhd v Kiong Siang Construction Sdn Bhd* [1999] 4 MLJ 130 for his argument to say that the application should have been made under the Subordinate Courts Rules 1980 ('the SCR') before the sessions court.

In that case there was an appeal from the decision of the sessions court judge where she had dismissed an application for extension of time to file a record of appeal to the High Court. One of the issues raised was whether the sessions court was the proper court to which an application for an extension of time to file the record of appeal in the High Court was made.

For a better appreciation of the matters of principle involved, arguments for and against the view that the sessions court has jurisdiction to entertain applications for extension of time, Ian Chin J's treatment of the matters is very helpful (at pp 133 –134):

A The sessions court judge was of the view that she had the jurisdiction to grant an extension of time to file the record of appeal in the High Court since, according to her, O 49 r 6(3) of the SCR prescribes the time within which the record of appeal is to be filed in the High Court and O 3 r 5 of the SCR allows an extension of time for doing any act required by the SCR. She also relied on *Lee Lan v Lim Yoon Loy & Ors* [1991] 3 MLJ 419. The case concerns the
B service of a notice of appeal and the Supreme Court there held at p 422 that: 'As the time prescribed for the filing and service of the notice of appeal 'is required or authorized by these rules', ie SCR O 49, it follows that the proper forum to apply for an extension of time is the court appealed from'. The Supreme Court also held that though an application could also be made to the High Court which has jurisdiction to entertain such an application under item 8 of the schedule to the Courts of Judicature Act 1964, the application should
C in the first instance be made to the lower court. Though that case concerns a notice of appeal, and not a record of appeal, it is nevertheless relevant because the decision turns on the interpretation of O 3 r 5 of the SCR with which the present case is also concerned. The Supreme Court there was of the view that since the time for service of the notice of appeal was prescribed by the then O 49 r 2 of the SCR, it, thus, came within the ambit of O 3 r 5 of the SCR, since
D the service of a notice of appeal is the doing of an act within a prescribed time, prescribed under the SCR.

Then, relying on the Supreme Court case of *Lee*, Ian Chin J continued to ask two questions. The first question was whether the filing of the record was an act within a certain time prescribed in the SCR:

E Applying the same approach as done in that case, the first question to ask is whether the filing of the record of appeal is an act within a certain time prescribed the SCR. The answer is 'yes' and it is provided by O 49 r 6(3) of the SCR which was only introduced in 1993. Since it is an act required by the SCR, it is within the ambit of O 3 r 5(1) of the SCR, and thus the sessions court has jurisdiction to extend the time. Mr Allan Lao, learned counsel for
F the respondent, argued that because the notice of appeal was already lodged with the High Court and the High Court had consequently registered the appeal, the High Court was seized of jurisdiction over the matter. Consequently, the lower court has no jurisdiction. That argument calls for answers to many questions. One of which is why there is no provision made in the RHC as to the time for the filing of the record of appeal?

G The second question posed by Ian Chin J is this — why was the amendment made to the SCR and not to the RHC providing for the time to file the record?

H The second question is why was the amendment made to the SCR providing for the time to file the record of appeal and not to the RHC if it was intended to exclude the lower court from having the jurisdiction to extend time? From those facts, it can be concluded that the legislature had intended that the lower court should have jurisdiction to extend the time for the filing of the record of appeal in the High Court; especially so when the amendment to the SCR providing for the filing of the record of appeal came after, though not
I necessarily because of, the decision of *Lee Lan v Lim Yoon Loy & Ors*. Furthermore, since the time for filing of the record of appeal is not prescribed by the RHC, the High Court's jurisdiction, which it has concurrent with the lower court, would come not by virtue of O 3 of the RHC but by virtue of item

8 to the schedule of the Courts of Judicature Act 1964 as decided in *Lee Lan v Lim Yoon Loy & Ors*.

The learned judge concluded that the judge of the sessions court was right in her decision that she had jurisdiction to hear an application for the extension of time to file the record of appeal in the High Court. But clear in his judgment is that the right of the sessions court is *concurrent* with that of the High Court by virtue of item 8 in the schedule to the Courts of Judicature Act 1964 ('the CJA') as was decided in the Supreme Court of *Lee Lan v Lim Yoon Loy & Ors*.

There appears, however, to be a decided case to say that resort cannot be had to item (or para) 8 of the schedule to the CJA.

In *Tan Lee Hong v Letchmee (Representative of the estate of Varathen, decd)* [1994] 1 MLJ 515, the facts disclose that the appellant had applied to the High Court for an order that leave be given to the appellant to lodge RM250 prescribed in the SCR as security for the costs of the appeal from the sessions court to the High Court outside the 14 day limit specified. The High Court dismissed the application in the High Court for enlargement of time, holding that the exercise of the additional powers of the High Court under s 25(2) of the CJA and para 8 of the schedule to the CJA to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding is subject to the proviso to s 25(2) of the CJA, which states that all such powers shall be exercised in accordance with any written law or rules of court relating to the same. The SCR falls within the meaning of written law in that proviso and, as O 49 r 2(5)(b) of the SCR specifically provides for such an application to be made to the court appealed from, the High Court lacked the power and jurisdiction to hear the application herein.

Section 25(2) reads as follows:

(1) ...

(2) Without prejudice to the generality of sub-s (1) the High Court shall have the additional powers set out in the Schedule:

Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same. (Emphasis added.)

What is to be noted is that para 8 of the schedule to the CJA has given power to the High Court to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding. That power has to be exercised 'in accordance with any written law or rules of court relating to the same.' There is no doubt that the High Court has power to enlarge time. The manner the power has to be exercised is subject to written law or rules and as it stands, no written law or rules have expressly prescribed the procedure for its exercise. The fact that such rules have not been provided does not oust the jurisdiction of the High Court.

It is important to note that before the High Court, there was an appeal which was properly filed, ie Civil Appeal No R1–12–367–98. The High Court is seized of the application, and I can see no good reason why when the appeal record was before the High Court, the application to file a

supplementary record cannot be heard in the High Court, since in any event the appeal proper is to be heard by the High Court.

Having said that, whether the application is by motion or summons in chambers is hardly important, so long as both parties in the application and the affidavits relied upon by both are before the court, and in any event the RHC is silent on the procedure.

However, for an extension of time to succeed, there must be good reason to show why the extension of time should be granted, ie why there was an omission to file their documents, and that reason was not supplied and accordingly the application should have been dismissed by the deputy registrar.

The appeal against the decision of deputy registrar is allowed with costs.

Appeal allowed with costs.

Reported by Wong Ee Lynn